SUPREME COURT, U.S.
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No. 92-1733

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

GUSSIE MAE JACKSON, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF CHARLES JACKSON, JR. AND ON BEHALF OF SANDRA ANN GARDNER, FRANK EDWARD GARDNER and WILLIE GARDNER a/k/a WILLIE JACKSON,

Petitioners,

vs.

ZAPATA HAYNIE CORPORATION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether there are "special and important reasons" for this Honorable Court to grant Petitioners' petition for a writ of certiorari where:

   a. There is no conflict between the decision of the United States Fifth Circuit Court of Appeals with the decision of any other United States court of appeals nor with the decision of any state court of last resort;

   b. The decision of the United States Fifth Circuit Court of Appeals did not depart from the accepted and usual course of judicial proceedings;

   c. The decision of the United States Fifth Circuit Court of Appeals does not address an "important question of federal law" which should be settled by this Honorable Court; and

   d. The decision of the United States Fifth Circuit Court of Appeals did not decide a federal question

in a way that conflicts with applicable decisions of this Honorable Court.

2. Whether this Honorable Court should impose a general duty on vessel owners to teach crew members to swim or to require crew members to wear flotation devices at all times, even when the circumstances which would force crew members to abandon ship are highly unforeseeable and where the vessel owner has taken all reasonable precautions to safeguard the crew.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Zapata Haynie Corporation ("Zapata") submits this Brief in opposition to the petition requesting issuance of a

Writ of Certiorari to review the Judgment and Opinion of the United States Fifth Circuit Court of Appeals entered on December 15, 1992.

OPINIONS AND JUDGMENTS BELOW

The unreported opinion of the United States District Court for the Western District of Louisiana, Monroe Division, was entered in Civil Action No. 89-2307 on April 26, 1991. (Appendix C of Petition for Writ of Certiorari.) In that opinion, the Honorable Donald E. Walter held that Zapata "was in no way at fault for either the accident itself or for any of the resulting injuries." Zapata was, therefore, exonerated from all liability in connection with the October 3, 1989 casualty.

The district court's ruling was affirmed in *Zapata Haynie Corp. v. Arthur*, 980 F.2d 287 (5th Cir. 1992). In upholding the lower court's judgment, the United States Court of Appeals for the Fifth Circuit "decline[d] to impose a general duty on vessel owners to teach crew members to swim or to require crew members to wear flotation devices at all

times."[3] The appellate court found no clear error in the trial court's conclusion that Zapata "took all reasonable precautions to safeguard the crew."[4]

STATEMENT OF JURISDICTION

Zapata adopts the Statement of Jurisdiction set forth by Petitioners.

Jurisdiction in the district court was premised on the federal court's jurisdiction of admiralty and maritime claims, 28 U.S.C. § 1333, as well as upon the provisions of the Limitation of Shipowners' Liability Act, 46 U.S.C. § 181, *et seq.*, and the Extension of Admiralty and Maritime Jurisdiction Act, 46 U.S.C. § 740.

This is an appeal from a final judgment rendered by the district court in favor of Respondent, Zapata. The United States Court of Appeals for the Fifth Circuit had jurisdiction under the provisions of 28 U.S.C. § 1291.

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3. *Zapata Haynie Corp. v. Arthur*, 980 F.2d 287, 292 (5th Cir. 1992).

4. *Id.*

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

Zapata instituted the proceedings below pursuant to the Limitation of Vessel Owner's Liability Act, 46 U.S.C. § 181, *et seq.*, which is set out verbatim in Appendix A hereto. The limitation proceeding was consolidated with Zapata's claim against Natural Gas Pipeline Company of America ("NGP") based on general maritime law.

Petitioners argue for an expansion of ship owner duties pursuant to the Jones Act, 46 U.S.C. § 688, which is set out verbatim in Appendix B hereto.

STATEMENT OF THE CASE

On October 3, 1989, at approximately 5:50 p.m. the menhaden steamer F/V NORTHUMBERLAND, owned and operated by Zapata, was routinely backing following its conduct of an ordinary, uneventful fishing set in approximately ten feet of water when the vessel struck and ruptured an unmarked, unburied 16" diameter natural gas transmission pipeline owned and operated by NGP. Within

seconds the entire vessel was engulfed in flames. There was not enough time for the crew members to make use of lifesaving and/or water survival equipment due to the rapid ignition and spread of the fireball. Eleven of the fourteen crew members, including Charles Jackson, died in this holocaust which immediately consumed the vessel.

Zapata's man overboard and lifesaving procedures exceeded Coast Guard requirements. Life preservers were issued to each member of the crew, including reflective material and a locator light. Each crew member could determine where his life preserver was to be kept and most, if not all, of the crew members chose to store their life preservers near their bunks. Four additional life preservers were stowed on deck as well as two extra water skiing flotation belts kept in the pilot house. Ski belts were issued to those crew members who worked in the purseboats and were required to be worn when disembarking the steamer onto the purseboats, during fishing operations in the purseboats, and when reboarding the steamer at the conclusion of the set. In this regard, Zapata exceeded the practice of the industry as

other menhaden companies did not require their fishermen to wear ski belts while working in the purse boats. There was no prohibition issued by Zapata to prohibit the crew members from continuing to wear ski belts or life jackets upon boarding the steamer after a fishing set had been completed.

There was ample testimony during the trial of this matter that the crew members of the F/V NORTHUMBERLAND were adequately trained in the use of life preservers. Emergency action drills were conducted three times during the 1989 season consisting of assembling all crew members wearing life preservers, identification and demonstration of emergency equipment and other procedures to be followed in an abandon ship situation.[5]

The magnitude of the casualty and the instantaneous nature of the fireball rendered personal flotation devices essentially useless. The explosion erupted at the stern sending a wall of flames sweeping forward across the vessel

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5. Petitioners state Zapata provided water survival training to nonseaman aircraft pilots but not to fishermen. In fact, Zapata offered survival instruction to assist pilots in responding to a plane crash -- Zapata did not provide basic "swimming lessons" to those pilots.

through the wheelhouse and over the bow where most of the crew members were working. None of the life preservers stowed on deck were used. Even the two ski belts in the wheelhouse (near the bow) located within just a few feet of where the captain and pilot were working at the time of the explosion were not utilized due to the immediacy of the situation.

The record in the trial court was devoid of evidence concerning the physical condition or circumstances of most of the crew members who drowned following the F/V NORTHUMBERLAND's explosion. There was absolutely no evidence from which to conclude that most of the crew members would have survived even if they had been wearing life preservers at the time they entered the water, or had received instructions in swimming. For example, some of the crew members may have been literally blown off the vessel by the explosion and rendered unconscious. Thus, although the autopsy reports indicated drowning as the cause of death, neither a life preserver nor the ability to swim would have prevented their drowning. Additionally, the drowning could

have been the result of a concussion or other traumatic injuries sustained by these crew members before entering the water. The drowning would have resulted, in that event, regardless of whether or not they were wearing a personal flotation device or had known how to swim.

Specifically with reference to Charles Jackson, the autopsy report indicated he sustained flash burns over the front and back of his body probably incurred before he abandoned ship as he was exposed to the intense heat generated by the wall of flames engulfing the vessel. The pathologist who performed the autopsy noted "[t]he superficial body skin was denuded over the front and back, representing approximately 90 percent loss."[6]

Thus, the only evidence in the record regarding the physical condition of Charles Jackson indicated it was unlikely a personal flotation device or the ability to swim would have changed the outcome of that fateful day as the

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6. Postmortem Examination Report of S.M. LeBer, M.D., set out verbatim in Appendix C hereto.

first rescue helicopter did not arrive on the scene for approximately twenty minutes.

On page 4 of their Petition for Writ of Certiorari, Petitioners purport to cite the testimony of Zapata's marine safety expert, Douglas Halsey, for two propositions, i.e., a mariner who cannot swim is exposed to greater risk than one who can and that Jackson drowned because he was not wearing a flotation device. In fact, Halsey did not address the cause of Jackson's death by drowning and explained that, depending on the circumstances, the ability to swim does not necessarily save a seaman forced to abandon ship:

> Q. Do you think, as a mariner, that a person who goes to sea in the menhaden industry, and is not able to swim, is he exposed to any additional risks for loss of life as opposed to those who can swim?
>
> A. I guess the potential may be greater. But I don't know how much greater. The Coast Guard typically assumes that most people can't swim. When we respond to a casualty we expect to have to be able to assist everyone.
>
> Q. But you do recognize, as you said, that the nonswimmer, insofar as loss of life has a greater potential, greater risk than a swimmer does, isn't that kind of obvious, isn't it?

A. Possibly, yes.

Q. Well, do you agree that it is or does not?

A. It depends where you are. If you're in frigid waters, it doesn't make a hill of beans if you can swim or can't, you're going to die. In some areas close inshore in temperate weather, a swimmer may stand a better chance.

Q. Sure. Now if you are given the proposition that it was common knowledge at the time of this accident, if you give that as a true proposition, it was common knowledge at the time of this accident that a great many of the fishermen in the menhaden industry did now know how to swim, don't you think that there should be, that that proposition that a great number of menhaden fishermen did not know how to swim should be addressed in some particular manner by this employer?

A. Not necessarily, no.

Q. Well, you say not necessarily. Should they do something at all, anything at all?

A. Well, I don't know what they could do. I think that the information contained in Zapata's Operations Manual and Safety Procedures are adequate. Certainly, the utilization of flotation devices at these particular time frames during the course of their routine procedures is adequate. I think that generally in the marine industry, whether it's menhaden fishermen or other parts of the marine industry, a lot of people can't swim. I don't and you have a danger of falling overboard. I don't know how to correct that, but I would not suggest that you

> undertake the task of teaching them to swim to make them wear a P.F.D. all the time.

Moreover, in addition to the intense heat encountered by the crew members before abandoning the vessel, the crew was also exposed to turbulent conditions in the water. Heat radiating from the burning vessel forced those in the water to repeatedly submerge their heads to escape the rising temperatures. Natural gas rolling up to the surface from the ruptured pipeline made the water like a boiling cauldron around the vessel and fire erupted on the surface of the water itself. This was no ordinary man overboard situation.

Expert testimony elicited at trial established that **neither the Navy nor the Merchant Marine requires its crew members to know how to swim nor is there any requirement for crew members to wear life jackets while in protected areas such as the deck of the vessel**. Furthermore, there are no rules, regulations, or statutes, including any Coast Guard regulations, which would have required any of the crew members of the F/V NORTHUMBERLAND to wear life preservers while working on the deck of the vessel. The procedures used aboard the

F/V NORTHUMBERLAND were likened to those used in the inland towing industry, a shallow draft operation similar to that being conducted by the F/V NORTHUMBERLAND. The inland towing industry requires all personnel to wear work vests when boarding, disembarking, riding in skiffs or when in the tow. The crew members are not required to wear work vests on the main deck of the towing vessel. A similar procedure was followed on the F/V NORTHUMBERLAND. The crew was required to wear ski belts when working in the purse boats. This provided protection for them when disembarking the steamer onto the purse boats, during fishing operations in the purse boats, and when reboarding the steamer at the conclusion of the fishing set.

The trial court record also indicates the Coast Guard specifically considered requiring the wearing of personal flotation devices and rejected the idea as infeasible. Due to limited space aboard vessels, it is not practical to wear a personal flotation device while on the steamer. Those devices would interfere with the crew members' normal transit on board the vessel. For example, the port to starboard

passageway immediately forward of fish holds on most menhaden steamers is so narrow that passage while wearing a personal flotation device would be extremely difficult.

Additionally, as an uninspected fishing vessel the F/V NORTHUMBERLAND was not required to, but did, in fact, have a steel bulwark surrounding the entire perimeter of the main deck. Specifically in the bow area of the vessel, where some of the crew members were located at the time of the explosion, the bulwark was chest high. Under most circumstances that bulwark would have provided more than adequate protection for the crew.

The evidence also indicated that this steamer served as home for the fishermen five days a week during the fishing season. To require crew members to wear personal flotation devices on the deck of the steamer at all times would have imposed a nearly impossible standard to enforce under those circumstances.

The crew members of the F/V NORTHUMBERLAND were aboard a stable 160 foot steamer surrounded by steel bulwarks in calm waters and would not have been confronted

with a hazard such as being thrown or falling overboard were it not for the highly unforeseeable allision with the exposed pipeline.

The crew of the F/V NORTHUMBERLAND was experienced in menhaden fishing and were adequately equipped to handle normal hazards encountered. However, no one could have been expected to anticipate the unburied, exposed pipeline which lurked beneath the waters off the Coast of Texas and which caused the explosion and immediate fire aboard the vessel.

Under the paramount right of navigation, the fishing industry had the right to expect NGP's pipeline to be buried. There was no reason for the master or crew of the F/V NORTHUMBERLAND or for Zapata's management to foresee an explosion and fire aboard the vessel which would have denied the crew time and opportunity to don ski belts, work vests or life preservers.

The unburied pipeline set the stage for the ensuing tragedy and created circumstances so horrific that neither personal flotation devices nor the ability to swim could have

overcome. Under these extraordinary circumstances, both the district court and the appellate court correctly concluded that the sole fault for the allision and resulting injuries and deaths rested with NGP whose pipeline had been exposed above the seabed for ten years in violation of its Corps of Engineers permit.[7]

SUMMARY OF ARGUMENT

1. The trial court's findings were based upon factual circumstances unique to the case *sub judice* and upon a correct application of the law. There are no "special and important reasons" justifying the issuance of a writ of certiorari.[8]

2. Neither the general maritime law nor the Jones Act[9] impose a general duty on vessel owners to teach crew members to swim or to require crew members to wear flotation devices at all times. Imposition of such a duty is

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7. NGP has not petitioned this Honorable Court for a Writ of Certiorari to review the finding that it was 100% at fault in causing the accident and resulting injuries and deaths.

8. Supreme Court Rule 10.

9. 46 U.S.C. § 688.

completely unwarranted in this factual situation where the circumstances which forced crew members to abandon ship were highly unforeseeable and where the vessel owner had taken all reasonable precautions to safeguard the crew.

ARGUMENT

I.

There are no "Special and Important Reasons" to Grant the Petition for Writ of Certiorari.

Petitioners attempt to create a conflict among the appellate circuits where there is none. Citing cases from the Fourth[10] and Ninth[11] Circuits for the proposition that a vessel owner owes a duty of rescue to its crew, Petitioners imply the Fifth Circuit has somehow abrogated the rescue doctrine in declining to impose a duty on vessel owners to teach crew members to swim or to require crew members to wear flotation devices at all times. The rescue doctrine is alive and well in the Fifth Circuit and was not affected in any way by the Court's ruling below.

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10. *Harris v. Pennsylvania R.R. Co.*, 50 F.2d 866 (4th Cir. 1931).
11. *Walsh v. Zuisei Kiaun K.K.*, 606 F.2d 259 (9th Cir. 1979).

The duty owed by a vessel owner under the maritime rescue doctrine was defined by the Fifth Circuit in *Reyes v. Vantage S.S. Co., Inc.*[12] Relying in part on the very same Fourth Circuit decision cited by Petitioners,[13] the Fifth Circuit agreed there was an affirmative "duty upon the ship to use every reasonable means to retrieve the seaman from the water."[14] However, as the Court noted, **the duty to rescue does not arise until the seaman enters the water** by jumping or falling overboard.[15]

Thus, the rescue doctrine does not encompass a duty on the ship to provide water survival training in advance of the man-overboard crisis. None of the reported decisions applying the maritime rescue doctrine have even hinted at such a duty.

Petitioners argue a writ of certiorari should be granted to "insure uniform protection of merchant seamen,"[16] to

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12. 609 F.2d 140 (5th Cir. 1980).
13. *Harris v. Pennsylvania R.R. Co.*, 50 F.2d 866 (4th Cir. 1931).
14. 609 F.2d at 142.
15. *Id.*
16. Petition for Writ of Certiorari at p. 7.

resolve a purported "conflict in the jurisprudence,[17] and to correct a perceived substantial deviation by the Fifth Circuit from "uniform maritime authorities held among the Circuit Courts."[18] Yet, Petitioners have not cited a single case from any circuit in which a general duty was imposed upon a vessel owner to provide water survival training or to require the use of flotation devices at all times. Thus, there is no conflict among the circuits -- none have recognized the duty advocated by Petitioners.

Petitioners are, in effect, attempting to cloak their argument with a nonexistent conflict among the circuits to elevate the issues to a "special and important"[19] plane to justify issuance of a writ of certiorari when, in fact, both the trial and appellate courts' rulings relied heavily on factual findings unique to the extraordinary circumstances occasioned by the October 3, 1989 casualty. Both the trial and appellate courts' conclusions were based on the very

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17. *Id.* at p. 8.
18. *Id.*
19. Supreme Court Rule 10.

"time honored protections afforded merchant seamen by this Court"[20] Petitioners claim were abrogated.

As the Fifth Circuit applied generally recognized principles of law which in no way resulted in any conflict among the circuits, this case does not merit review on writ of certiorari.

II.

Neither the General Maritime Law nor the Jones Act Impose a General Duty on Vessel Owners to Teach Crew Members to Swim or to Require Crew Members to Wear Flotation Devices at all Times.

Petitioners cite no authority whatsoever to support their argument for imposition of an all-encompassing duty on ship owners to teach crew members to swim or to require the use of flotation devices at all times. There simply is no such duty. **Neither the United States Navy nor the Merchant Marine requires all crew members to learn to swim.** It is not the practice in the fishing industry to provide water survival training. And neither the jurisprudence nor

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20. Petition for Writ of Certiorari at p. 8.

statutory law mandates such a course of action by ship owners. As the Court explained in *Davis v. Parkhill-Goodloe Company*:[21]

> [T]he capacity to swim is a safeguard only so long as the unpredictable occurrence does not render the victim incapable of swimming, or this capability is inadequate to overcome the violent forces at work.[22]

Likewise, there is no jurisprudential or statutory mandate requiring crew members to wear flotation devices at all times. There are cases in which, under specific facts, the court concluded the seaman should have been wearing a life preserver. However, those cases are clearly factually distinguishable from the circumstances arising out of the explosion of the F/V NORTHUMBERLAND.

In *Noble v. Moore-McCormack Lines*,[23] the court faced a factual situation remarkably similar to that presented in the instant case. There, the fishing trawler CORINTHIAN was fishing with a crew of eleven fishermen when another vessel

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21. 302 F.2d 489 (5th Cir. 1962).

22. *Id.* at 493.

23. 96 F.Supp. 369 (D.Mass. 1951).

emerged through the fog striking the CORINTHIAN and throwing her crew into the water. Six of the crew members drowned and their survivors instituted suits under the Death on the High Seas Act. The owner of the CORINTHIAN sought exoneration from or limitation of liability and the court consolidated the actions for trial.

The CORINTHIAN carried a life preserver for each man stored in the crew members' bunks. On the forward deck of the vessel were boxes where four additional life preservers were stored. There were also two ring buoys on the deck of the vessel and the captain's life preserver in the pilot house. The claimants contended the CORINTHIAN was at fault in failing to have life preservers "readily accessible" within the meaning of 46 U.S.C.A. § 526e. The court, however, found no fault on the vessel and granted limitation of liability, explaining:

> I do not find that the Corinthian was at fault by reason of the location of the life preservers in the bunk of each seaman. The boat had provided each seaman with a life preserver, and they were as readily accessible from the bunks as they would have been from any other part of the boat at any given moment. I find nothing in the evidence to indicate that the members of the crew were

> compelled to keep the preservers in their bunks at all times. While it may be argued that at the moment of collision the men were on deck and the life preservers should have been there with them, it does not necessarily follow that the failure of the crew to carry their preservers on the deck was any fault on the part of the ship. The rules provide, 46 U.S.C.A. §526e, that the life preservers shall be 'so placed as to be readily accessible.' I find that the preservers were readily accessible within the meaning of the statute. **I cannot find that the ship's owner can be held to have anticipated that the Mormacfir would strike her at a point which prevented access below-deck. There was further no evidence to indicate that the supply of life preservers and ring buoys on the deck was exhausted.** There being no unseaworthiness on the part of the Corinthian, her petition for limitation of liability should be allowed. [emphasis added].[24]

In *Schlichter v. Port Arthur Towing Company*,[25] a seaman drowned when he fell overboard while relieving himself on the after deck near the starboard side of the vessel. At the time of the incident the vessel was moored to the dock of a chemical company in the Ouachita River at Sterlington, Louisiana. The decedent had been the sole crew member left aboard the vessel with responsibility for its safe keeping. He

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24. *Id.* at 371-372.

25. 288 F.2d 801 (5th Cir.), *cert. denied*, 368 U.S. 828, 82 S.Ct. 50, 7 L.Ed.2d 32 (1961).

locked the door to the compartment where the life preservers were stored such that when he fell overboard, his companions were unable to obtain a life jacket to throw to him.

The issue before the court was the sufficiency of the life saving gear on board and whether it was readily accessible in the event of an emergency. The court noted there were not less than a dozen life jackets aboard the vessel. The fact that they were not accessible was due to the decedent's own actions in locking the compartment. Importantly, the court noted **a total lack of any evidence to show that the availability of life jackets would have saved the decedent's life**. Where he was or where he might have been seen was not shown in any way by the evidence at trial. As the court explained "[f]or a life preserver to be effective, there must be a person within its reach or at least thought to be within the specific area where the preserver is to be thrown." *Id.* at 806.

In a similar vein, in *Tate v. C.G. Willis, Inc.*,[26] the decedent fell striking his head on the main deck of the barge

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26. 154 F.Supp. 402 (E.D.Va. 1957).

causing him to fall overboard between the barge and the dock. As the barge was an unmanned vessel, there were no life jackets aboard. However, life lines were available to be thrown to the decedent. The court stressed the need for a causal connection between the failure to use life saving equipment and the decedent's drowning:

> . . . **some reasonable inference of probable success in saving the life of the seaman must exist**. Even assuming that other things could have been done by the crew members in using life rings, life lines, or causing a member of the crew to jump overboard in the small space available, **there is no suggestion that any of these efforts would have assisted in saving the seaman's life**. [Emphasis added.][27]

If a vessel owner has a general duty to require nonswimming crew members to wear life preservers, such a duty would certainly have been recognized in *Derouen v. Vaughn Marine, Inc.*[28] The plaintiffs brought their action under the Jones Act and General Maritime Law for the drowning death of their son alleging that the vessel owner was negligent and/or the vessel was unseaworthy because the

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27. *Id.* at 410.

28. 529 F.2d 1222 (5th Cir. 1976).

crew members did not wear life jackets. The Court did not even address the issue of the duty to wear life jackets, affirming the jury's conclusion that there was no negligence on the part of the vessel owner. Surely, had there been such a duty, the Court would have reversed the jury's determination and remanded the case for further proceedings.

The cases in which employers have been held to a duty to require the use of life preservers involved either extremely inexperienced seamen placed in hazardous conditions or the dangerous transfer of a seaman from one vessel to another.[29] Neither of those conditions was present aboard the F/V NORTHUMBERLAND at the time of this accident. The F/V NORTHUMBERLAND was staffed with an experienced crew, which was required to wear ski belts while transferring from the steamer to the purse boats and from the purse boats back to the steamer, and there was no indication of a danger

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29. *Sadler v. Pennsylvania R. Co.*, 159 F.2d 784 (4th Cir. 1947); *Grantham v. Quinn Menhaden Fisheries, Inc.*, 344 F.2d 590 (4th Cir. 1965); *Davis v. Parkhill-Goodloe Company*, 302 F.2d 489 (5th Cir. 1962); *Deal v. A.P. Bell Fish Co.*, 674 F.2d 438 (5th Cir. 1982); and *Hebert v. Otto Candies, Inc.*, 402 F.Supp. 503 (E.D.La. 1975).

or hazard against which the crew should have been protected at the time of the accident.

There is clearly no general duty for a vessel owner, such as Zapata, to require the use of life preservers or other personal flotation devices in the circumstances present aboard the F/V NORTHUMBERLAND at the time of the accident.

CONCLUSION

The Fifth Circuit's opinion comports with the law of this Court and the other circuit courts. All are noticeably silent in the area advanced by Petitioners. As there is no conflict among the Circuits, there is no special and important reason for this Court to review the lower courts' holdings.

Moreover, under the unique factual circumstances presented herein, there is absolutely no justification for the fashioning of a newly-created duty on vessel owners to teach seamen to swim or to require the use of flotation devices at all times. Considering the violent forces at work when the F/V NORTHUMBERLAND was instantaneously consumed in fire, there was no evidence to indicate such measures would have prevented the drowning death of the badly burned and traumatized Jackson.

Where, as here, the vessel owner has exceeded regulatory requirements in safeguarding its crew and is met with a highly unusual and unforeseeable disaster, it is the party causing the disaster who should bear the full weight of responsibility for it. Petitioners are not left without recourse

by the opinions of the lower courts. Although the ship owner was exonerated, the guilty party, NGP, was held accountable and was available to satisfy Petitioners' damages.[30]

Accordingly, Zapata urges this Honorable Court to deny Petitioners' request for a writ of certiorari.

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30. Petitioners asserted a separate claim against NGP in the United States District Court for the Eastern District of Texas, Beaumont Division, which ended in a settlement of over $2 million in favor of Petitioners.

APPENDIX A

46 U.S.C. § 181, et seq.

CHAPTER 8 - LIMITATION OF VESSEL OWNER'S LIABILITY

Sec.

181. Liability of masters as carriers.

182. Loss by fire.

183 Amount of liability; loss of life or bodily injury; privity imputed to owner; "seagoing vessel."

183a. Repealed.

183b. Stipulations limiting time for filing claims and commencing suit.

183c. Stipulations limiting liability for negligence invalid.

184. Apportionment of compensation.

185. Petition for limitation of liability; deposit value of interest in court; transfer of interest to trustee.

186. Charterer may be deemed owner.

187. Remedies reserved.

188. Limitations of liability of owners applied to all vessels.

189. Limitation of liability of owners of vessels for debts.

190. Stipulations relieving from liability for negligence.

191. Stipulations relieving from exercise of due diligence in equipping vessels.

192. Limitation of liability for errors of navigation, dangers of the sea and acts of God.

193. Bills of lading to be issued; contents.

194. Penalties; lien; recovery.

195. Certain provisions inapplicable to transportation of live animals.

§ 181. Liability of Masters as Carriers

If any shipper of platina, gold, gold dust, silver, bullion, or other precious metals, coins, jewelry, bills of any bank or public body, diamonds, or other precious stones, or any gold or silver in a manufactured or unmanufactured state, watches, clocks, or timepieces of any description, trinkets, orders, notes, or securities for payment of money, stamps, maps, writings, title deeds, printings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with any other materials, furs, or lace, or any of them, contained in any parcel, or

package, or trunk, shall lade the same as freight or baggage, on any vessel, without at the time of such lading giving to the master, clerk, agent, or owner of such vessel receiving the same as written notice of the true character and value thereof, and having he same entered on the bill of lading therefor, the master and owner of such vessel shall not be liable as carriers thereof in any form or manner; nor shall any such master or owner be liable for any such goods beyond the value and according to the character thereof so notified and entered. R.S. § 4281.

§ 182. Loss by Fire

No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner. R.S. § 4282.

§ 183. Amount of Liability; loss of life or bodily injury; privity imputed to owner; "seagoing vessel"

(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

(b) In the case of any seagoing vessel, if the amount of the owner's liability as limited under subsection (a) of this section is insufficient to pay all losses in full, and the portion of such amount applicable to the payment of losses in respect of loss of life or bodily injury is less than $420 per ton of such vessel's tonnage, such portion shall be increased to an amount equal to $420 per ton, to be available only for the payment of losses in respect of loss of life or bodily injury. If such portion so increased is sufficient to pay such losses in full, they shall be paid therefrom in proportion to their respective amounts.

(c) For the purpose of this section the tonnage of a seagoing steam or motor vessel shall be her gross tonnage without deduction on account of engine room, and the tonnage of a seagoing sailing vessel shall be her registered tonnage: *Provided*, That there shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use.

(d) The owner of any such seagoing vessel shall be liable in respect of loss of life or bodily injury arising on distinct occasions to the same extent as if no other loss of life or bodily injury had arisen.

(e) In respect of loss of life or bodily injury the privity or knowledge of the master of a seagoing vessel or of the superintendent or managing agent of the owner thereof, at or prior to the commencement of each voyage, shall be deemed conclusively the privity or knowledge of the owner of such vessel.

(f) As used in subsections (b), (c), (d) and (e) of this section and in § 183(b) of this title, the term "seagoing vessel" shall not include pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels or their tenders, self-propelled lighters, nondescript self-propelled vessels, canal boats, scows, car floats,

barges, lighters, or nondescript non-self-propelled vessels, even though the same may be seagoing vessels within the meaning of such term as used in § 188 of this title. R.S. § 4283; August 29, 1935, c. 804, § 1, 49 Stat. 960; June 5, 1936, c. 521, § 1, 49 Stat. 1479.

§ 183a. Repealed. June 5, 1936, c. 521, § 5, 49 Stat. 1481.

§ 183b. Stipulations limiting time for filing claims and commencing suit

(a) It shall be unlawful for the manager, agent, master, or owner of any sea-going vessel (other than tugs, barges, fishing vessels, and their tenders) transporting passengers or merchandise or property from or between ports of the United States and foreign ports to provide by rule, contract, regulations, or otherwise a shorter period for giving notice of, or filing claims for loss of life or bodily injury, than six months, and for the institution of suits on such claims, than one year, such period for institution of suits to be computed from the day when the death or injury occurred.

(b) Failure to give such notice, where lawfully prescribed in such contract, shall not bar any such claim --

(1) If the owner or master of the vessel or his agent had knowledge of the injury, damage, or loss and the court determines that the owner has not been prejudiced by the failure to give such notice; nor

(2) If the court excuses such failure on the ground that for some satisfactory reason such notice could not be given; nor

(3) Unless objection to such failure is raised by the owner.

(c) If a person who is entitled to recover on any such claim is mentally incompetent or a minor, or if the action is one for wrongful death, any lawful limitation of time prescribed in such contract shall not be applicable so long as no legal representative has been appointed for such incompetent, minor, or decedent's estate, but shall be applicable from the date of the appointment of such legal representative; *Provided, however,* That such appointment be made within three years after the date of such death or injury. R.S. § 4283A, as added August 29, 1935, c. 804, § 3, 49, Stat. 960.

§ 183c. Stipulations limiting liability for negligence invalid

It shall be unlawful for the manager, agent, master, or owner of any vessel transporting passengers between ports of the United States or between any such port and a foreign port to insert in any rule, regulation, contract, or agreement any provision or limitation (1) purporting, in the event of loss of life or bodily injury arising from the negligence or fault of such owner or his servants, to relieve such owner, master, or agent from liability, or from liability beyond any stipulated amount, for such loss or injury, or (2) purporting in such event to lessen, weaken, or avoid the right of any claimant to a trial by any court of competent jurisdiction on the question of liability for such loss or injury, or the measure or damages therefor. All such provisions or limitations contained in any such rule, regulation, contract, or agreement are declared to be against public policy and shall be null and void and of no effect. (As amended November 4, 1992, Pub.L. 102-587, Title III, § 3006, 106 Stat. 5068.)

§ 184. Apportionment of compensation

Whenever any such embezzlement, loss, or destruction is suffered by several freighters or owners of goods, wares,

merchandise, or any property whatever, on the same voyage, and the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel, in proportion to their respective losses; and for that purpose the freighters and owners of the property, and the owner of the vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto. R.S. § 4284; February 27, 1877, c. 69, § 1, 19 Stat. 251.

§ 185. Petition for limitation of liability; deposit of value of interest in court; transfer of interest to trustee

The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security

therefor, as the court may from time to time fix as necessary to carry out the provisions of § 183 of this title, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of § 183 of this title. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease. R.S. § 4285; June 5, 1936, c. 521, § 3, 49 Stat. 1480.

§ 186. Charterer may be deemed owner

The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this chapter relating to the limitation of the liability of the owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof. R.S. § 4286.

§ 187. Remedies reserved

Nothing in sections 182, 183, 184, 185 and 186 of this title shall be construed to take away or affect the remedy to which any party may be entitled, against the master, officers, or seamen, for or on account of any embezzlement, injury, loss, or destruction of merchandise, or property, put on board any vessel, or on account of any negligence, fraud, or other malversation of such master, officers, or seamen, respectively, nor to lessen or take away any responsibility to which any master or seaman of any vessel may by law be liable, notwithstanding such master or seaman may be an owner or part owner of the vessel. R.S. § 4287.

§ 188. Limitation of liability of owners applied to all vessels

Except as otherwise specifically provided therein, the provisions of sections 182, 183, 183b-187 and 189 of this title shall apply to all seagoing vessels, and also to all vessels used on lakes or rivers or inland navigation, including canal boats, barges, and lighters. R.S. § 4289; February 18, 1875, c. 80, § 1, 18 Stat. 320; June 19, 1886, c. 421, § 4, 24 Stat. 80; June 5, 1936, c. 521, § 4, 49 Stat. 1481.

§ 189. Limitation of liability of owners of vessels for debts

The individual liability of a shipowner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessels and freight pending: *Provided*, That this provision shall not prevent any claimant from joining all the owners in once action; nor shall the same apply to wages due to persons employed by said shipowners. June 26, 1884, c. 121, § 18, 23 Stat. 57.

§ 190. Stipulations relieving from liability for negligence

It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising out from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge.

Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect. February 13, 1893, c. 105, § 1, 27 Stat. 445.

§ 191. Stipulations relieving from exercise of due diligence in equipping vessels

It shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence[1] properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided. February 13, 1893, c. 105, § 2, 27 Stat. 445.

1. Probably should read "to."

§ 192. Limitation of liability for errors of navigation, danger of the sea and acts of God

If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master by held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service. February 13, 1893, c. 105, § 3, 27 Stat. 445.

§ 193. Bills of lading to be issue; contents

It shall be the duty of the owner or owners, masters, or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be prima facie evidence of the receipt of the merchandise therein described. February 13, 1893, c. 105, § 4, 27 Stat. 445.

§ 194. Penalties; lien; recovery

For violation of any of the provisions of sections 190-193 of this title the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading provided for, shall be liable to a fine not exceeding $2,000 00. The amount of the fine and costs for such violation shall be a lien upon

the vessel, whose agent, owner, or master is guilty of such violation, and such vessel may be libeled therefor in any district court of the United States, within whose jurisdiction the vessel may be found. One-half of such penalty shall go to the party injured by such violation and the remainder to the Government of the United States. February 13, 1893, c. 105, § 5, 27 Stat. 446.

§ 195. Certain provisions inapplicable to transportation of live animals

Sections 190 and 193 of this title shall not apply to the transportation of live animals. February 13, 1893, c. 105, § 7, 27 Stat. 446.

§ 196. Certain law unaffected

Sections 190-195 of this title shall not be held to modify or repeal sections 181, 182, and 183 of this title, or any other statute defining the liability of vessels, their owners, or representatives. February 13, 1893, c. 105, § 6, 27 Stat. 446.

APPENDIX B

46 U.S.C. § 688

§ 688. Recovery for injury to or death of seaman

(a) Application of railway employee statute; jurisdiction

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

(b) Limitation for certain aliens; applicability in lieu of other remedy

(1) No action may be maintained under subsection (a) of this section or under any other maritime law of the United States for maintenance and cure or for damages for the injury or death of a person who was not a citizen or permanent resident alien of the United States at the time of the incident giving rise to the action if the incident occurred --

> (A) while that person was in the employ of an enterprise engaged in the exploration, development, or production of off-shore mineral or energy resources -- including but not limited to drilling, mapping, surveying, diving, pipelaying, maintaining, repairing, constructing,or transporting supplies, equipment or personnel, but not including transporting those resources by a vessel constructed or adapted primarily to carry oil in bulk in the cargo spaces; and
>
> (B) in the territorial waters or waters overlaying the continental shelf of a nation other than the United States, its territories, or possession. As used in this paragraph, the term "continental shelf" has the meaning stated in article I of the 1958 Convention in the Continental Shelf.

(2) The provisions of paragraph (1) of this subsection shall not applicable if the person bringing the action establishes that no remedy was available to that person --

> (A) under the laws of the nation asserting jurisdiction over the area in which the incident occurred; or

(B) under the laws of the nation in which, at the time of the incident, the person for whose injury or death a remedy is sought maintained citizenship or residency.

(As amended December 29, 1982, Pub.L. 97-389, Title V, § 503(a), 96 Stat. 1955.)

APPENDIX C

POSTMORTEM EXAMINATION REPORT

S.M. Le Ber, M.D.
Pathologist

5840 Monroe Street
Groves, Texas 77619

NAME: JACKSON, Charles, Jr. AGE: 53 SEX: M. RACE: Black

DATE AND TIME OF DEATH: 10-3-89 - 1745 AUTOPSY NO. MEA-89-105

PLACE OF DEATH: Five miles S.W. of Sabine Pass, 1 mile offshore

DATE AND TIME OF AUTOPSY: 10-5-89 - 0745

PLACE OF AUTOPSY: Clayron-Thompson Funeral Home, Groves, Texas 77619

AUTHORIZATION FOR AUTOPSY: Judge A.E. Halter

PROSECTOR: S.M. Le Ber, M.D.

ANATOMIC DIAGNOSIS

IMMEDIATE CAUSE OF DEATH:	SUBMERGED GASLINE EXPLOSION
MANNER OF DEATH:	ACCIDENTAL
MECHANISM OF DEATH:	DROWNING BY SUBMERSION
ADDITIONAL DIAGNOSES:	ASPIRATION OF STOMACH CONTENTS INTO LUNGS ACUTE HYPEREMIA OF LUNGS ACUTE PULMONARY EDEMA OF LUNGS

FLASH-BURNS OVER FRONT & BACK
OF BODY
BODY # 3 (DESIGNATED)

/S/

S.M. Le Ber, M.D.

SML:ms

PRELIMINARY NOTE: The deceased was a 53-year old black male who was named as Second Mate on the motor, fishing vessel, NORTHUMBERLAND which was apparently fishing in the Gulf of Mexico waters, approximately five miles southwest of Sabine pass, approximately half to one mile offshore, on October 3, 1989 at approximately 1745, when the vessel allegedly struck a submerged Gas Pipeline, rupturing it. Almost immediately there was an explosion, and fire enveloped the ship. The deceased was either thrown or jumped overboard. The exact time of the recovery of his body was not known, but the body, when it surfaced, was taken by local ambulance to Clayron-Thompson Funeral Home in Groves, Texas, where an autopsy was requested by Judge A.E. Halter, and was performed on the unembalmed body on October 5, 1989 at 0800.

EXTERNAL EXAMINATION: The body was that of a well developed, well nourished, adult black male. The body had no clothing on it when delivered. The body was 75 inches in length and his weight was estimated to be 195 pounds.

He had short, black hair, mustache and chin whiskers. The superficial body skin was denuded over the front and back, representing approximately 90% loss.

There was a 1½ inch healed scar on the right forehead, and a 1½ inch similar, healed scar, over the lateral aspect of the right biceps area.

Two teeth were missing, the right, upper lateral incisor, (#7), and the left upper central incisor (#9). The rest of the dentition was intact, and no restorations were noted.

The body was relatively well preserved and showed no evidence of tissue destruction due to marine life.

No other significant external findings were noted.

INTERNAL EXAMINATION: The body was opened through a high-Y incision, the incision being extended to the superior border

of the symphysis pubis. The skin flaps were reflected and the sternum was removed in the usual manner. The organs were in their normal position. The organs were removed en bloc from the sublaryngeal area to the anus for definitive dissection. At this time, a blood sample was taken and labeled with the autopsy number, MEA-89-105, and #3 which was designated as the third body to be delivered to Mr. Gerrit J. Walhout, of the National Transportation Safety Board for Toxicology.

CARDIOVASCULAR SYSTEM: The heart was free within the pericardial sac and was normal in size and shape. The coronary arteries were patent and there was no evidence of recent or remote myocardial infarction. The valves and cusps were normal. The aorta demonstrated minimal atherosclerosis.

RESPIRATORY SYSTEM: There were no pleural adhesions. The tracheobronchial tree contained small quantities of stomach contents. There was no evidence of neoplastic disease and the cut surfaces demonstrated acute pulmonary edema and hyperemia.

LIVER: The liver was normal in size and gross appearance. It was

uniform throughout and no lesions were present. The gallbladder contained a small amount of amber bile. No stones were present.

PANCREAS: The pancreas was normal in size and shape and demonstrated a normal, creamy-tan lobular architecture. No lesions were present.

SPLEEN: The spleen was normal in size, shape and appearance. No lesions were present.

ADRENAL GLANDS: Both glands were identified and they showed no significant postmortem changes. No lesions were present.

KIDNEYS: Both kidneys were normal in size, shape and appearance. The capsules stripped with ease to reveal a smooth cortex. The cut surfaces showed normal markings and no significant increase in peripelvic fat. The kidney parenchyma demonstrated uniform hyperemia. The ureters were normal. The urinary bladder contained no urine and the mucosa was normal.

GASTROINTESTINAL SYSTEM: The esophagus contained small particles of stomach contents and the stomach contained

about one pint of fluid and partially digested food. There was no evidence of mucosal ulceration. The small and large intestines were normal and the appendix was normal.

CENTRAL NERVOUS SYSTEM: No internal examination of the head was made.

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SUMMARY: The deceased was a 53 year old black male who was identified as Charles Jackson, Jr. by fingerprints and a photo.

The immediate cause of death was due to the Explosion and Fire resulting from the rupture of a submerged gas pipeline. The manner of death is deemed to have been Accidental and the Mechanism of death was due to Drowning by Submersion.

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